considered insubordinate if he failed to comply. As a result of his actions, plaintiff was placed on administrative leave for the remainder of the day. Following plaintiff's conduct at the meeting, on March 22, 1991, Saunders consulted the Area Personnel Office for BIA about removing plaintiff as soil conservationist based on the continuous problems with his performance in that position. After a discussion with the personnel office, Saunders decided to propose a suspension of plaintiff instead of removal. The proposed removal was not made known to plaintiff.

A few days later, Shadwick, with Saunders' concurrence, had to instruct plaintiff to comply with regulations limiting lease terms on land that was in an estate to no more than two years, even though plaintiff disagreed with the regulations. Just days prior to the proposed suspension of plaintiff, in early April of 1991, Saunders determined that plaintiff had inappropriately discussed with the Jackson County Sheriff the status of a certain leased tract on which plaintiff believed marijuana was being cultivated. Plaintiff interfered in a realty matter even after being instructed to stay out of realty and concentrate solely on farm plans. This breach of duty was addressed in the proposed suspension.

On April 19, 1991, Saunders personally gave plaintiff the proposed fourteen day suspension in writing. The proposed suspension provided that any actual suspension was left to the discretion of the Area Director and that plaintiff could respond to the proposal; in other words, the suspension was merely a proposal that could be challenged by plaintiff and was subject to the Area Director's final determination. Saunders asked plaintiff if he had any questions about the proposed suspension when she gave it to him. Plaintiff indicated he had no questions. Plaintiff acknowledged receipt of the suspension and never availed himself of the opportunity to respond to the proposal. Nor did he challenge the proposal or seek a final

determination by the Area Director.

Saunders intended for the proposed suspension to correct plaintiff's conduct and performance, not to cause plaintiff to resign. After being presented with the proposed suspension, plaintiff immediately submitted written notice that he was resigning "as a result of [her] continued misrepresentation of the truth regarding [his] work and [his] intentions in [his] work." Plaintiff made no reference to sex discrimination as a basis for his resignation. On April 19 and 22, 1991, the Administrative Officer at Horton, Galen Hubbard, met with plaintiff and encouraged plaintiff not to resign. Hubbard also suggested several alternatives to resignation so that plaintiff could continue his employment with the government, but plaintiff refused. While resigning, plaintiff never indicated that he was resigning because he believed he had been singled out. Instead, plaintiff said he was resigning because "sometimes a man's gotta do what he's gotta do." After plaintiff resigned, Saunders was willing to allow plaintiff to return as the Soil Conservationist in Horton, but plaintiff placed unacceptable conditions on his return.

Prior to receiving the proposed suspension, plaintiff visited the personnel office and told the Anadarko Area Personnel Officer, Evaline Gomez, that he was going to resign because he was "very unhappy. He did not like the Superintendent, he could not work with her, and she was just too pushy." Gomez asked that plaintiff not resign, but he resigned anyway.

As Superintendent, Saunders was a demanding supervisor with all employees. Saunders also had to deal with work related problems with female employees. She gave a minimally successful performance evaluation to one female employee and counseled another female employee about deficiencies in her performance. Unlike plaintiff, the other employees corrected the deficiencies addressed by Saunders. Saunders hired both male and female employees

whileat the Horton Agency.

After resigning, plaintiff filed an EEO complaint of sex discrimination, which became BIA Complaint No. 91-031, on June 26, 1991. On July 23, 1991, plaintiff's complaint of discrimination was accepted for processing with the following allegation:

> You alleged discrimination based on sex (Male) when your employment conditions were made such that you were compelled to resign on April 19, 1991 (for example: Memorandum of Admonishment dated August 17,1990; January 7, 1991, performance appraisal review; March 22, 1991, incident; and the Memorandums of Proposed 14 day Suspension dated April 19, 1991). (Constructive Discharge).

Complaint of Discrimination BIA 94-052

On January 14, 1994, plaintiff went to the Horton Agency and met with Linda Saunders, who was still the Superintendent there. Plaintiff brought a copy of a letter he received on December 16, 1993 from OPM. The letter stated as follows:

> You have not previously, nor are you currently, debarred from employment.
>
> ...
>
> Your application has been returned to OPM's Wichita Service Center where it will be available for referral to interested agencies as vacancies occur. Agencies have the responsibility to select the most highly qualified candidates from the applicants referred to them. Agencies are also responsible for adjudicating the suitability of applicants and eligibles for, and appointees to, Low Risk and Non-Sensitive positions, Public Trust Risk positions, and National Security positions within the agency. Your eligibility will provide you with full consideration for all positions for which you

> qualify. However, it does not represent a guarantee of an appointment.

Plaintiff believed this letter guaranteed him the position of Soil Conservationist at the Horton Agency. Plaintiff told Saunders that he wanted the Soil Conservationist's job, which had already been filled when Eugene Harter was selected for the position. Saunders had not seen the letter from OPM. Plaintiff showed Saunders the letter, and she read it while plaintiff was in her office. Saunders interpreted the letter differently than plaintiff; she understood the letter to mean that the agency decided if a person was suitable for employment with that agency. In addition, Saunders interpreted the letter to mean that if plaintiff applied for vacancies and was determined to be qualified, his name would be placed on a Certificate of Eligibles.

After reading the letter, Saunders explained to plaintiff that there were no vacancies at the Horton Agency. Plaintiff became argumentative and loud during the meeting, so argumentative in fact that Saunders felt threatened by his behavior. Saunders felt threatened and perceived her conversation with plaintiff as unproductive so she asked plaintiff to leave her office, not the building. She did not ask plaintiff to leave for any other reason such as prior EEO activity.

On March 1, 1994, plaintiff filed an EEO complaint of discrimination against BIA arising out of the incident with Saunders. On June 10, 1994, BIA accepted plaintiff's complaint of discrimination for processing of the following:

> ...Your complaint was filed against the Bureau of Indian Affairs...based on reprisal...
>
> On or about December 16, 1993, you received OPM's decision which stated that you met the suitability standards for Federal employment. On January 14, 1994, you went to see the Horton Agency Superintendent regarding the OPM

determination and the Soil Conservationist position, but she informed you that the Bureau of Indian Affairs had determined that you were not suitable for employment and when you asked her who in the BIA made that decision, she stated that she made that decision and ordered your removal from the building. Please review the accepted allegation and bases carefully. If you have any questions or concerns regarding the accepted allegation, please notify this office within 10 calendar days of receipt of this letter. If we do not hear from you, the accepted allegation will be investigated as identified.

Complaint of Discrimination 95-027

Plaintiff applied for the position of Soil Conservationist in Horton, Kansas, which became vacant when Eugene Harter resigned in March of 1994. This vacancy opened in March 14, 1994, and closed on April 4, 1994. The vacancy was advertised by the Andarko Area Personnel Office, not through OPM. When plaintiff filed for this vacancy, Evaline Gomez was the Anadarko Area Personnel Officer. According to plaintiff, Gomez encouraged him to file an EEO complaint when he resigned as Soil Conservationist in 1991.

In her capacity as the Anadarko Area Personnel Officer, Gomez had been delegated the authority to adjudicate suitability issues when an applicant applied directly to the agency. Gomez made a suitability determination based on the OPM Suitability Determination letter dated December 16, 1993, Quad Standard X118, FPM 338 and FPM 731-3, which authorized the agency to perform suitability determinations at the local agency level. Suitability is a term used to mean a requirement or requirements for employment by the federal government having reference to character, reputation, trustworthiness, and fitness of the

person under consideration as it relates to the efficiency of the service. A person's misconduct or negligence in employment is a consideration in determining suitability.

Gomez determined that plaintiff was not suitable for the position of Soil Conservationist at the Horton Agency, and accordingly, she did not certify plaintiff to the selecting official for the most recent vacancy, which arose when Harter resigned. Gomez determined that plaintiff met the experience and education requirements for Soil Conservationist, but plaintiff did not meet the qualification requirements set forth in the Quad Standard X118 because as the former Soil Conservationist in Horton, plaintiff did not fulfill his assignments, did not comply with the missions of the agency, was not cooperative, and was disruptive and defiant. In making this determination, Gomez considered plaintiff's conduct in his prior employment as Soil Conservationist at the Horton Agency.

In 1994, Jeannie Cooper was an Employee Relations Specialist with the Anadarko Area Personnel Office, and she was supervised by Gomez. After plaintiff applied and during the time that Gomez determined he was unsuitable for the position, Gomez consulted Cooper and expressed concerns about placing plaintiff in the same position from which he had resigned because she believed it would have an adverse impact on the Horton Agency and the efficiency of services there based on plaintiff's prior performance problems, insubordination, and defiance toward the Superintendent. Cooper agreed with Gomez that plaintiff was not suitable for the Soil Conservationist position at the Horton Agency and testified that based upon plaintiff's prior conduct, it was not a difficult decision to find plaintiff unsuitable for the position.

The Anadarko Area Personnel Office did refer plaintiff as qualified and eligible for other position vacancies, including some at the Horton Agency.

On August 11, 1993, the Anadarko Area Office referred plaintiff as an eligible applicant for the position of Rights Protection Specialist. The Anadarko Area Office also referred plaintiff as an eligible applicant for the Realty Specialist in the Horton Agency in 1993, and later in 1998, while Gomez was still the Personnel Officer, plaintiff was referred for the Superintendent's position at the Horton Agency.

Waldo Leander, a nonIndian, whose date of birth was August 9, 1958, was ultimately selected as the new Soil Conservationist.

On April 11, 1995, plaintiff filed an EEO complaint of discrimination based on race, age and reprisal, which became BIA Complaint 95-027. On July 7, 1995, plaintiff's complaint of discrimination was accepted with the following allegation:

> You applied, were rated qualified (you allege you were the only qualified Indian Preference applicant), but not certified to the selecting official for the position of Soil Conservationist, GS-457-11, located at the Horton Agency, Horton Kansas . .
> . . You allege discrimination when Anadarko Area's Office of Personnel Management did not certify you to the selecting official for consideration . . . even though in a letter dated December 16, 1993, OPM-Boyers, Pennsylvania, issued a decision that determined you to be suitable for Federal Employment and that your elibibility would provide you with full consideration for all position for which you qualify.

Complaint of Discrimination 99-045

In 1998 and 1999, Claudia Wheeler was a Personnel Staffing Specialist with BIA in Anadarko, Oklahoma. Her job duties included recruiting and advertising vacancies, rating applicants, and issuing certificates of lists of eligible qualified applicants. Wheeler's office was responsible for

advertising the vacancy for the Superintendent at the Horton Agency. Evaline Gomez was the Chief Personnel Officer at the time. Wheeler did not know plaintiff when the Superintendent's position was being advertised.

The position of Superintendent at the Horton agency was advertised three different times: from August 3, 1998 to September 2, 1998; from October 20, 1998 to November 19, 1998; and from November 30, 1998 to December 29, 1998. Plaintiff applied for the position the first time it was advertised. At that time, it was advertised as a GS-13 position. There were a total of eight applicants, including plaintiff. Of those eight, five, including plaintiff, were determined to meet the basic qualification requirements of the position. Those five candidates were referred to the selecting official without ranking them because there were five or fewer qualified candidates. The selecting official returned the certificate of eligible applicants without making a selection and requested that the position be readvertised.

Dan Deerinwater, the selecting official, was the Anadarko Area Director with supervisory responsibility over the Horton Agency when the Superintendent's vacancy was advertised in 1998. After the position was first advertised he received the certificate of eligible applicants with only five qualified applicants listed. Among those was plaintiff, Richard Beams. Deerinwater decided not to select any of the five candidates because he believed the applicant pool was too small and the vacancy announcement had not reached a large enough group of people who might be interested in the position. He also did not consider any of the five applicants to be superiorly qualified for the job. Deerinwater viewed plaintiff's experience as being primarily related to land operations, soil conservation, and realty. He viewed plaintiff as lacking experience in tribal operations, roads maintenance and construction, and in trust responsibility.

Deerinwater requested that the position be readvertised, which occurred from October 20, 1998, to November 19, 1998, but no new applicants applied. The original five qualified applicants, including plaintiff, were carried forward for consideration as eligible applicants. When no new applicants applied in response to the second announcement, Deerinwater requested that the position be readvertised as a GS-12/13 with the goal of obtaining a broader pool of applicants from which to select. Deerinwater understood that the original five qualified candidates would be carried forward for consideration. At the time, Deerinwater knew of plaintiff and that plaintiff had problems in the past with the Horton Agency Superintendent. Deerinwater did not know that plaintiff had filed EEOC complaints until some time after the Superintendent's vacancy was filled.

The third advertisement of the Superintendent vacancy resulted in twenty-four applications, comprised of sixteen new applications and the eight applications received in response to the first advertisement. Of the twenty-four applicants, fifteen were determined to be qualified; these fifteen included the original five qualified applicants, whose applications had been carried forward. Plaintiff was included among the fifteen qualified applicants.

BIA regulations, specifically 44 Bureau of Indian Affairs Manual 335, (BIAM) subsection 1.17A, required the formation of a promotion panel because of the large number of qualified applicants and the grade level of the position. In forming the promotion panel, Wheeler served in an advisory capacity. Three panel members, all of whom held a position at the same or higher grade level of GS-12/13, were selected. The three panel members were Betty Tippeconnie, who was the Superintendent at the Anadarko Agency, Bruce Maytubby, who was a regional realty officer, and Galila Johnson, who was the Superintendent of the Concho

Agency. The panel was convened in Anadarko on January 25, 1999.

Each member of the ranking panel was given fifteen applicant packages and a ranking sheet to rank each of the applicants in the areas of knowledge, skill and abilities with a score of 5 for being superiorly qualified and a score of 1 for being acceptably qualified based upon the information contained in each applicant's application. The panel members worked independently of each other in ranking the applicants.

Panel member Galila Johnson rated plaintiff as a 1 for knowledge of government programs, a 3 in managerial leadership ability and program management, a 3 in relationships within the BIA and the Indian Community, and a 1 on ability to communicate. Johnson knew plaintiff at the time, but she did not know that he had made EEO complaints. Panel member Betty Tippeconnie rated plaintiff with a 1 in all four of the categories based upon the information in plaintiff's application, the crediting plan, and the position description. Tippeconnie believed plaintiff had only an acceptable level of knowledge, skills and abilities. Tippeconnie did not know plaintiff nor that he had ever participated in any EEOC activity. Panel member Bruce Maytubby rated plaintiff as a 3 in two of the categories, a 1 in one of the categories, and a 2 in the other category. Maytubby knew plaintiff and knew he had some EEO activity, but he did not have any specific knowledge of plaintiff's complaints. The knowledge he had did not impact his ranking of plaintiff's application.

Claudia Wheeler totaled the scores given by the members of the ranking panel to each of the fifteen qualified applicants, which were recorded on the Summary of Panel Member Evaluation for Merit Promotion. Based on Wheeler's totaling of panel member scores, Johnson awarded plaintiff a total score of 8, Tippeconnie awarded plaintiff a total score of 4, and Maytubby, the only one with

knowledge of plaintiff's EEO activity, awarded plaintiff the highest total score of 9. The scores were added together by Wheeler and divided by three (the number of panel members) giving plaintiff a total average score of 7. Wheeler totaled and averaged the scores for each of the fifteen qualified applicants. Pursuant to 44 BIAM 335, Wheeler determined that a score of 12 was the cutoff point, meaning that only applicants with an average score of 12 or higher would be referred to the selecting official. With an average score of only 7, plaintiff was not referred to the selecting official. Five of the fifteen applicants scored at 12 or above, and they were referred on a certificate of eligibles to the selecting official. Galen Hubbard was selected from these final five applicants. Hubbard was the Administrative Officer at the Horton Agency, and Deerinwater selected Hubbard as the Superintendent based upon his knowledge, skills and abilities, his current location at the Horton Agency, and his existing relationship with other employees at the Horton Agency.

On June 14, 1999, plaintiff filed an EEOC complaint, which became BIA Complaint 99-045. On December 27, 2000, BIA accepted plaintiff's complaint of discrimination for processing of the following:

> You applied for Anadarko Area Vacancy Announcement Number AN-98-52, for the position of Superintendent, GS-340-13 . . . which Opened: 8-03-98 and Closed09-02-98. The position was readvertised under the same Anadarko VacancyNumber AN-98-52 . . . that Opened 10-20-98 and Closed 11-19-98. The position was against readvertised under the same Anadarko Vacancy Announcement Number AN-98-52, but advertised as Superintendent, GS-340-12/13, that Opened 11-30-98 and Closed 12-29-98. In a letter dated April 15, 1999, the AnadarkoArea Personnel Office informed you that you were rated qualified but not

rated among the Best Qualified Group that was referred/certified to the selecting official.

III. Discussion

Title VII makes it an unlawful practice for an employer "to fail to hire . . . any individual .. . because of such individual's . . . sex,"[33] and to discriminate against a job applicant because he has opposed an unlawful employment practice or "made a charge, testified, assisted or participated in any manner" in Title VII proceedings.[34] Title VII applies to federal employees.[35] The ADEA sets forth an analogous prohibition against discrimination based upon age in federal employee personnel actions.[36]

Absent direct evidence of discrimination, courts apply the legal standards announced in *McDonnell Douglas Corp v. Green*,[37] to Title VII and ADEA claims.[38] *McDonnell Douglas* and its progeny establish "an allocation of the burden of production and order for the presentation of proof . . . in discriminatory-treatment cases."[39] "First, the plaintiff must establish a prima facie case of discrimination."[40] If the plaintiff makes out a prima facie case, the burden shifts to the defendant to "produce evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate nondiscriminatory reason."[41] In the Tenth Circuit, the burden of proving anondiscriminatory reason has been characterized as "exceedingly light."[42] If the defendant produces evidence showing a legitimate, nondiscriminatory reason for its

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33 42 U.S.C. § 2000e-2(a)(1).

34 42 U.S.C. § 2000e-3(a).

35 *See* 42 U.S.C. § 2000e-16(a).

36 See 29 U .S.C. §633a; *Villescas v. Abraham*, 311 F.3d 1253, 1257 (10th Cir. 2002).

37 411 U.S. 792 (1973).

38 *See, e.g., Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142 (2000); *Sanchez v. Denver Pub. Schools*, 164 F.3d 527 (10th Cir. 2002) (ADEA and Title VII claims).

39 *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993).

alleged actions, "the *McDonnell Douglas* framework - with its presumptions and burdens - disappear[s] . . . and the sole remaining issue [is] discrimination vel non . . . ."[43] In order to prevail at this stage, the plaintiff must demonstrate that the defendant's proffered explanation is not its true reason, but instead is a pretext for discrimination.[44] Although the intermediate evidentiary burdens shift back and forth under this framework, "the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff."[45]

BIA Complaint 91-031

In this claim, plaintiff contends that his resignation as Soil Conservationist constituted reverse sex discrimination and constructive discharge in violation of Title VII. When bringing a claim for reverse gender discrimination, the *Mc-Donnell Douglas* burden-shifting framework ismodified because males belong not to a historically disfavored group, but rather, to a historically favored group.[46] Thus, when a member of a favored group alleges disparate treatment, "themodified because males belong not to a historically disfavored group, but rather, to a historically favored group.[46] Thus, when a member of a favored group alleges disparate treatment, "thecourts have adjusted the prima facie case to reflect this specific context by requiring a showing of background circumstances which support the suspicion that the defendant is that unusualemployer who discriminates

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40*Reeves*, 530 U.S. at 142. 41*Id.*

42*Anaeme v. Diagnostek, Inc.*, 164 F.3d 1275, 1279 (10th Cir.), *cert. denied*, 528 U.S. 814 (1999). 43*Reeves*, 530 U.S. at 142-43.

44*Texas v. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981), *Rivera v. City & County of Denver*, 365 F.3d 912, 920 (10th Cir. 2004).

45*Reeves*, 530 U.S. at 143.

46*See Livingston v. Roadway Express, Inc.*, 802 F.2d 1250, 1252-53 (10th Cir. 1986).

against the majority."[47] A plaintiff can also state a prima facie case of reverse discrimination by presenting "direct evidence of discrimination, or indirect evidence sufficient to support a reasonable probability, that but for the plaintiff's status the challenged employment decision would have favored the plaintiff."[48]

Plaintiff has provided no direct evidence of discrimination, nor has he provided any indirect evidence sufficient to support a reasonable probability that he suffered a constructive discharge because of his sex. The incidents to which plaintiff refers to support his sex discrimination claim demonstrate at best a personality conflict between plaintiff and Saunders. Plaintiff essentially claims that Saunders and the Reality Department personnel were incompetent and that he could have better served the Horton Agency. This incompetence, plaintiff asserts, resulted in an increased workload for him, which even a diligent employee would have been unable to handle, and thus, he was unjustly terminated. When plaintiff was presented with the proposed suspension by Saunders, he immediately submitted written notice that he was resigning "as a result of [her] continued misrepresentation of the truth regarding [his] work and [his]intentions in [his] work." Plaintiff made no reference to sex discrimination as a basis for his resignation. Plaintiff forgets that his claim is for gender discrimination, not wrongful termination without just cause. In fact, plaintiff claims that after he resigned "Ms. Saunders harassed some female employees to the point that plaintiff was told that Antionette Houle, Reality Specialist, was considering quitting also." Plaintiff may have demonstrated that Saunders was a difficultsupervisor who engendered conflict, but he has not provided even

47*Sanchez v. Phillip Morris Inc.*, 992 F.2d 244, 248 (10th Cir. 1992).

48*Notari v. Denver Water Dept.*, 971 F.2d 585, 590 (10th Cir. 1992); *see also Mattioda v. White*, 323 F.3d 1288, 1293 (10th Cir. 2003) (noting that "Notari continues to operate as Tenth Circuit precedent").

a hint of evidence that this conflict occurred because of his sex.

Plaintiff also produced no background circumstances which support the suspicion that the defendant is that unusual employer who discriminates against the majority. To the contrary, plaintiff's averments support the conclusion that even if Saunders actions could somehow be construed to constitute discrimination, she discriminated equally against both male and female employees. It is uncontroverted that Saunders was a demanding supervisor with all employees, and that she had to deal with work related problems with female employees as well as plaintiff. She gave a minimally successful performance evaluation to one female employee and counseled another female employee about deficiencies in her performance. Unlike plaintiff, the female employees did not feel compelled to resign because of Saunders' corrective action, but instead corrected the deficiencies addressed by Saunders. Plaintiff has not shown that Saunders was the unusual employer who discriminates against the majority and consequently, has not established a prima facie case of discrimination.

Even, assuming, *arguendo*, that plaintiff had established a prima facie case of reverse gender discrimination, summary judgment would still be appropriate because defendant has articulated legitimate nondiscriminatory reasons for its actions. The uncontroverted facts establish that even prior to Saunders' tenure as Supervisor, Brian Pogue encountered problems with plaintiff's work in the Horton agency and determined that plaintiff's record keeping system was deficient and that plaintiff interfered with Pogue's appraisal duties. Moreover, plaintiff failed to perform his job duties over at least a six-month period during Saunders' tenure; he was counseled about his deficiencies and he ignored his supervisors' orders. Six months before theproposed

suspension, plaintiff was instructed to prioritize his job tasks to bring his leasing activities current and to provide completed tasks to his supervisors, but plaintiff's work product continued to be inadequate. Plaintiff was told to stop involving himself in matters other than the completion of farm plans; instead he attended a lease sale and visited the Jackson County Road Supervisor, Ronald Karn, to discuss a road right-of-way closure in direct contravention of his supervisor's orders. While visiting with Karn, plaintiff gave Karn the impression that plaintiff had the authority to make demands related to road right-of-ways. This caused Karn to call Saunders with his concerns and Saunders confirmed that plaintiff neither had the authority, nor the responsibility to make road right-of-way decisions.

Plaintiff's insubordinate conduct continued even after he was counseled about this actions. On March 22, 1991, Shadwick met with plaintiff to discuss his failure to finish the farm plans and his conversation with Karn concerning the road right-of-way. During the meeting, plaintiff became defensive, walked out, and had to be placed on administrative leave for the remainder of the day as a result of his conduct. Additionally, in early April of 1991, Saunders determined that plaintiff had inappropriately discussed with the Jackson County Sheriff plaintiff's belief that marijuana was being grown on a certain leased tract. Plaintiff's actions culminated in a April 19, 1991, meeting in which Saunders gave plaintiff a proposed fourteen day suspension. In response, plaintiff immediately resigned.

The Court concludes that defendant had legitimate nondiscriminatory reasons forpresenting plaintiff with the notice of suspension. Plaintiff had demonstrated a pattern of insubordinate conduct, and deficient work product. Both are legitimate nondiscriminatory reasons to fire an employee.[49] Plaintiff has produced no evidence that defendant's proffered presenting plaintiff with the notice of

suspension. Plaintiff had demonstrated a pattern ofinsubordinate conduct, and deficient work product. Both are legitimate nondiscriminatory reasons to fire an employee.[49] Plaintiff has produced no evidence that defendant's proffered reason for his suspension was not the true reason for its actions, other than his own conclusory reason for his suspension was not the true reason for its actions, other than his own conclusory views about his performance at the Horton agency. Plaintiff has not produced any evidence that the alleged deficiencies in his work product that were documented over at least a six month period were merely imagined by defendant. As such, plaintiff has also failed to show that defendant's explanation for his suspension was a pretext for discrimination.

To the extent plaintiff alleges a constructive discharge because of his sex, his claim similarly fails. Constructive discharge occurs "when the employer, by its illegal discriminatory acts, has made working conditions so difficult that a reasonable person in the employee's position would feel compelled to resign."[50] A plaintiff's suggestive views are irrelevant as a plaintiff must objectively demonstrate that he had "no other choice but to quit."[51]

As previously discussed, there is no evidence that plaintiff was given the proposed suspension because of his male gender. Indeed, even before receiving the proposed suspension, plaintiff told the Andarko Area Personnel Officer that he was going to resign because he was very unhappy, he did not like Saunders and could not work with

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[49]*E.g., Birdwhistle v. Kansas Power & Light Co.*, 723 F. Supp. 570, 574 (D. Kan. 1989) (insubordination);
McCue v. State of Kansas, Dep't of Human Res., 938 F. Supp. 718, 724 (D. Kan. 1996) (poor work performance).

[50]*Sanchez v. Denver Public Schools*, 164 F.3d 527, 534 (10th Cir. 1998).

[51]*Id.*

her because "she was just too pushy." After being presented with the proposed suspension, he said that he was resigning because "sometimes a man's gotta do what he's gotta do," not because he had been unfairly treated because of his gender.

More importantly, plaintiff has not demonstrated that he was left with no other choice but to resign. Plaintiff voluntary resigned when presented with the proposed fourteen day suspension. This was merely a proposed suspension to which plaintiff was allowed an opportunity to respond before the suspension took effect. Plaintiff never responded to the proposal, nor discussed the proposed suspension with the Area Director, who made the final suspension determination, before resigning. On April 19, and 22, 1991, Galen Hubbard met with plaintiff and encouraged him not to resign. Hubbard suggested several alternatives to resignation so that plaintiff could continue his employment with the government. Plaintiff rejected these suggestions. Thus, not only has plaintiff not demonstrated that he was discharged because of his sex, but he has not shown that he had no other choice but to quit. His constructive discharge claim fails as a matter of law.

BIA Complaint 94-052

In BIA Complaint 94-052, plaintiff claims his confrontation with Saunders in January 1994 regarding the OPM letter constituted retaliation in violation of Title VII. The OPM letter indicated that plaintiff had never been disbarred from federal employment and that his application would be referred to agencies as vacancies arose. Yet, plaintiff construed this letter as guaranteeing him the position of Soil Conservationist at the Horton agency, a position that had already been filled by Eugene Harter, and demanded to be re-employed in his former position. Saunders disagreed and refused to rehire plaintiff. These allegations alone form the basis of BIAComplaint 94-052.[52]

52Plaintiff attempts to relate this claim to the original decision to remove his

A prima facie showing of retaliation requires proof that: "(1) the plaintiff engaged inprotected opposition or participated in a Title VII proceeding; (2) the employer acted adversely subsequent to or contemporaneous with employee activity; and (3) there is causal connection between plaintiff's activity and the employer's action."[53] There is no dispute that filing plaintiff'sprior EEO complaint constitute protected activity.

The second prong of a prima facie case requires proof of an adverse employment action. An adverse employment action constitutes "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[54] In a claim for failure to hire, *McDonnell Douglas* "demand[s] that the alleged discriminatee demonstrate at least that his rejection did not result from the absence of a vacancy in the job sought."[55] Consequently, "there can be no finding of an adverse employment action if there was no vacancy at the time plaintiff applied or theposition was never filled."[56] Here, it is uncontroverted that the position of Soil Conservationist was not vacant when plaintiff demanded that he be rehired in that capacity. Eugene Harter was serving as Soil Conservationist at the Horton agency at that time. Consequently, plaintiff has

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name from the list of eligible
applicants for the Soil Conservationist vacancy that was created b y plaintiff's 1991 resignation, and that was filled in
1992 by Harter. This claim, however, has already been litigated in *Beams* v *Norton*, 256 F. Supp. 2d 1203, 1215-16
(D. K an. 2003) and plaintiff is estopped from relitigating this matter. *See Augustine v. Adams*, 88 F. Supp. 2d 1166,
1170 (D. Kan. 2000) (discussing issue and claim preclusion).

53*Mattioda v. White*, 323 F.3d 1288, 1293 (10th Cir. 2003).

54*Annett v. Univ. of Kansas*, 371 F.3d 1233, 1237 (10th Cir. 2004).

55*Int'l Bhd. of Team sters v. United States*, 431 U.S. 324, 358 n.44 (1977).

56*Morgan v. Fed. Home Loan Mortgage Corp.*, 172 F. Supp. 2d 98, 112-13 (D.D.C. 2001).

failed to demonstrate an adverse employment action"causal connection by proffering Plaintiff also fails to satisfy the third prong of his prima facie case of retaliation. He fails to demonstrate a causal connection between his filing of EEO complaints and Saunders' refusal to rehire him. "The causal-connection element of a prima facie retaliation claim requires the employee to show that the employer's motive for taking adverse action was its desire to retaliate for the protected activity."[57] A plaintiff may also establish a evidence of circumstances that justify an inference of retaliatory motive, such as protected conduct closely followed by adverse action."[58] Plaintiff has not shown that Saunders refused to rehire him because of his prior EEO activity; nor does a temporal proximity exist to create an inference of retaliatory motive. It had been approximately three years since plaintiff filed his EEO complaint alleging that he was unlawfully terminated in violation of Title VII. Even a three-month time period, standing alone, is insufficient to establish causation.[59] Clearly a three year time period is much too long to establish a causal connection.

Even if plaintiff had established a prima facie case of retaliation, defendant has articulated legitimate, non-discriminatory reasons for its failure to rehire plaintiff. First, the position sought by plaintiff was not vacant, but rather was already filled by Eugene Harter.
Additionally, plaintiff had already proven his inability to fulfill the responsibility of the Soil Conservationist along with his inability to follow directionfrom the position's supervisor. When plaintiff was the Soil Conservationist, he demonstrated his incompetence and was routinely

57*Wells v. Colorado Dep't of Transp.*, 325 F.3d 1205, 1218 (10th Cir. 2003).
58*Annett v. Univ. of Kansas*, 371 F.3d at 1239-40.
59*Anderson v. Coors Brewing Co.*, 181 F.3d 1171, 1179 (10th Cir. 1999).

insubordinate. The Court concludes that defendant its decision was not motivated by discriminatory intent. Plaintiff offers no evidence to suggest these reasons are merely pretextual. Consequently, summary judgment is proper on plaintiff's retaliation claim relating to BIA Complaint 94-052.

BIA Complaint 95-027

In BIA Complaint 95-027, plaintiff claims that he was discriminated against on the basis of age, race and reprisal when he was not certified as a qualified applicant for the Soil Conservationist position in the Spring of 1994. The Court addresses each of plaintiff's claims in turn.

Race and Age Discrimination

To prove a prima facie case for discriminatory failure to hire, plaintiff must prove that: (1) he belongs to a protected class; (2) he applied for and was qualified for a job for which the employer was seeking applicants; (3) despite being qualified, he was rejected; and (4) after his rejection, the position remained open and the employer continued to seek applicants from persons of plaintiff's qualifications.[60] For a race discrimination claim, a plaintiff need not establish that defendant hired someone outside the protected class to make out a prima facie case of race discrimination.[61] However, an age discrimination claim under the ADEA requires proof that the person hired was younger than the plaintiff.[62] The prima facie case for both race and age claims requires a plaintiff to eliminate the most common nondiscriminatory reasons for not hiring an applicant, including lack of qualifications and absence of a vacancy.[63] It is not disputed that plaintiff

60Garcia v. Pueblo Country Club, 299 F.3d 1233, 1238 (10th Cir. 2002) (quoting Kindrick v. Penske Transp. Servs. Inc.., 220 F.3rd 10th Cir. 2000)).
61*Kendrick*, 220 F. 3d at 1226.
62*Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1004 (10th Cir.), *cert denied*, 517 U.S. 1245, 116 S. Ct. 2500
(1996); *Beams v. Norton*, 256 F. Supp. 2d 1203, 1214 (D. Kan. 2003).
63*Kendrick*, 220 F.3d at 1226-27.

belonged to a protected class, applied for the position of Soil Conservationist and that someone outside the protected class was hired in the position. Defendant hired Waldo Leander, a non-Indian who was younger than plaintiff, to fill the Soil Conservationist vacancy. Nevertheless, defendant argues that plaintiff fails to satisfy his prima facie case because he cannot prove that he was a qualified applicant for the Soil Conservationist position. In support of this argument, defendant relies upon plaintiff's inability to fulfill the responsibilities of the job in his previous stint as Soil Conservationist. Plaintiff was, however, technically qualified for the position; he met the experience and educational requirements for the Soil Conservationist vacancy. Gomez simply determined that although plaintiff was technically qualified for the position, he was not a suitable candidate for Soil Conservationist because of his prior conduct in the position. The Court, bearing in mind that the burden imposed on a plaintiff at the prima facie stage is not onerous,[64] concludes that plaintiff has stated a prima facie case of race and age discrimination.

Despite plaintiff proving a prima face case of discrimination, his claims still fail because defendant has articulated legitimate, nondiscriminatory reasons for its actions, and plaintiff has failed to show that these reasons were pretextual. As previously discussed in connection with BIA Complain 91-031,[65] plaintiff had already demonstrated incompetence in the position of SoilConservationist. He did not complete assignments on time and interfered in matters outside hisjob responsibilities. In addition, he was insubordinate and repeatedly denied his supervisors' requests. Poor work habits and insubordination both constitute legitimate nondiscriminatory reasons for defendant's decision not to

64*Tungol v. Certainteed Corp.*, 202 F. Supp. 2d 1189, 1197 (D. Kan. 2002).
65*See infra* p. 25-27.

rate plaintiff as suitable for the Soil Conservationist position.[66] Plaintiff has not suggested that defendant's proffered reasons for its actions were merely a pretext and not the true reasons for its actions. As such, defendant's motion for summary judgment on plaintiff's age and race discrimination claims related to BIA Complaint 95-027 must be granted.

Retaliation

Plaintiff claims that he was not rated as suitable for the position of Soil Conservationist because of his prior EEO complaints. To establish a prima facie case of retaliation, plaintiff must show that he engaged in protected activity, suffered an adverse employment action, and that there was a causal connection between the two. It is uncontested that plaintiff's prior EEO filings constitute protected activity and that defendant's failure to hire plaintiff as the Soil Conservationist at the Horton Agency resulted in an adverse employment action. To prove his prima facie case, plaintiff must also show that there was a causal connection between his prior EEO complaints and defendant's decision to rate him unsuitable for the Soil Conservationist vacancy. Plaintiff must prove either that the employer's motive for taking the adverse action was its retaliatory desire, or that circumstances exist, such as temporal proximity, which justify an inference of retaliatory motive.[67] Planitff has not shown that Gomez sought to retaliate against him because of his prior EEO activity. Indeed, plaintiff credits Gomez with encouraging him to

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66See *e.g., Birdwhistle v. Kansas Power & Light Co.*, 723 F. Supp. 570, 574 (D. Kan. 1989)
(insubordination); *McCue v. State of Kansas, Dep't of Human Res.*, 938 F. Supp. 718, 724 (D. Kan. 1996) (poor
work performance).

67*See Wells v. Colorado Dep't of Transp.*, 325 F.3d 1205, 1218 (10th Cir. 2003); *Annett v. Univ. of Kansas*,
371 F.3d at 1239-40.

file an EE omplaint when he resigned from the Horton agency in 1991. Moreover, the Anadarko Area Personnel Office referred plaintiff as qualified for other vacancies, including openings at the Horton Agency. For instance, while Gomez was still the personnel officer, plaintiff was referred for the Superintendent's position at Horton.

Nor has plaintiff established a temporal proximity sufficient to create an inference of retaliation. To the Court's knowledge, plaintiff's most recent prior EEO complaint was filed on March 1, 1994. The EEO complaint at issue in this retaliation claim was not filed until April 11, 1995. A thirteen month gap between an EEO filing and an adverse employment action is insufficient, in itself, to establish a causal connection.[68] Thus, the Court concludes that plaintiff has failed to prove a prima facie case of retaliation.

Even supposing plaintiff had established a prima facie case of retaliation, his claim would still fail because defendant's professed reasons for its actions, plaintiff's incompetence and insubordination, are, as repeatedly discussed by the Court, legitimate nondiscriminatory reasons for defendant's actions. Plaintiff has not suggested that defendant's decision not to rate him as suitable was motivated by anything other than his past incompetence in the identical position for which he sought employment, and his past insubordinate attitude toward the individual who would supervise him if he were deemed suitable and ultimately hired as the Soil Conservationist. As such, plaintiff has failed to show that the reasons advanced by defendant for not certifying Plaintiff's retaliation claim fails as a him as suitable were a pretext for unlawful discrimination.Plaintiff's retaliation claim fails as a matter of law.

68*See Anderson v. Coors Brewing Co.*, 181 F.3d 1171, 1179 (10th Cir. 1999) (Even a three-month time
period, standing alone, is insufficient to establish causation).

BIA Complaint 99-045

In his final BIA Complaint, plaintiff claims that defendant's failure to select him as Superintendent for the Horton agency in 1999 was in retaliation for his prior EEO filings. This claim too fails as plaintiff has not established a prima facie case of retaliation nor shown that defendant's professed reason for its actions was in reality a pretext for unlawful discrimination.

To establish a prima facie case of retaliation, plaintiff must show that he engaged in protected activity, suffered an adverse employment action, and that there was a causal connection between the two. There is no question that plaintiff had engaged in protected activity by filing EEO complaints or that defendant's refusal to hire plaintiff resulted in an adverse employment action. The downgrade of the position from a GS 13 to a GS 12 level, though, was not an adverse employment action because plaintiff's name was always included in the list of qualified applicants.

Plaintiff, however, must still show a causal connection between his previous activity and the defendant's decision not to hire him. Plaintiff has made absolutely no attempt to show the requisite causal connection. In fact, in his "Response to Defendant's Statement of Facts," plaintiff only responds to one of the thirty-one uncontested facts related to this claim and this response is completely irrelevant to the causal connection showing. Moreover, only one person involved in the process for selecting the Superintendent knew that plaintiff had filed EEO complaints; a panel member who ranked plaintiff and whose rankings were responsible for paring down the number of applicants, knew that plaintiff had engaged in protected activity, but he ranked plaintiff higher than any other member of the panel. No evidence disputes his testimony that his knowledge of plaintiff's prior EEO activity did not affect his rankings of plaintiff. Nor is there

causal connection; plaintiff's most recent EEO complaint had been filed in 1995, approximately four years before the alleged adverse employment action. Plaintiff has, thus, failed to demonstrate a prima facie case of unlawful retaliation.

Even if plaintiff had established a prima facie case, his claim would still fail as defendant has articulated legitimate, nondiscriminatory reasons for failing to hire plaintiff as Superintendent, and plaintiff does not suggest that these reasons are a pretext to hide defendant's true intentions. First, the downgrading of the position from a GS level 13 to GS level 12, even if it did constitute an adverse action, was for the purpose of increasing the applicant pool for an important supervisory position above five and constitutes a legitimate nondiscriminatory reason for defendant's actions. Secondly, plaintiff did not make the final cut of applicants because he failed to score high enough in the areas of knowledge of government programs, managerial leadership ability and program management, relationships within the BIA and the Indian Community, and ability to communicate. Defendant has shown plaintiff was not selected because he was not qualified, not because he had previously filed EEO complaints. The only evidence plaintiff offers to suggest that the selection process was unfair is a favorable statement from a Supervisor in 1990, but this evidence is not relevant. The opinions of plaintiff's supervisor in 1990 have no bearing on whether the Panel members fairly evaluated plaintiff in 1999. As such, plaintiff fails to show that defendant's articulated reasons for its actions were merely pretextual and this claim fails as a matter of law.

IT IS THEREFORE ORDERED BY THE COURT that defendant's Motion for Summary Judgment is GRANTED and this case is dismissed.

IT IS SO ORDERED.

Dated this 7th day of September 2004.

S/ Julie A. Robinson
Julie A. Robinson
nited States District Judge